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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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4 In re

Case No.

5 WORLDCOM, INC., et al., 02-13533

6 Reorganized Debtors.

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7 January 17, 2006

11:50 a.m.

8 United States Custom House  
One Bowling Green  
9 New York, New York 10004

10 DIGITALLY RECORDED PROCEEDINGS  
(EXCERPT)

11

12 11:45 WORLDCOM, INC., ET AL  
WorldCom's Motion for Summary Judgment  
Against Parus Holdings, Inc.'s,  
13 Successor-By-Merger to EffectNet, Inc. and  
EffectNet, LLC.

14

Opposition by Parus Holdings, Inc. filed.

15

Debtors' Motion to Strike Portions of  
16 Affidavits Submitted in Support of Claimant  
Parus Holdings, Inc.'s Response and  
17 Opposition to WorldCom's Motion for Summary  
Judgment.

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Opposition by Parus Holdings, Inc. filed.

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B E F O R E:

20

THE HONORABLE ARTHUR J. GONZALEZ  
United States Bankruptcy Judge

22

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13                 - and -  
14                 KEVIN J. SMITH, ESQ.

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5 JUDGE GONZALEZ: Please be seated.

6 The Debtors' Motion for Summary  
7 Judgment.

10 JUDGE GONZALEZ: All right. Go  
11 ahead.

12 MR. DRISCOLL: Your Honor, in this  
13 proceeding Claimant Parus Holdings asserts  
14 two claims. First is for breach of contract  
15 against WorldCom's wholly-owned subsidiary  
16 Intermedia, and the second is against both  
17 WorldCom and Intermedia, asserting various  
18 consequential damage claims premised on  
19 WorldCom and Intermedia's asserted acting in  
20 concert to breach the same contract.

18 On the breach of contract claim  
19 that is pending, only two issues, I believe,  
20 need to be resolved. The first is the number  
21 of Reconciliation Payments Intermedia owes;  
22 four are acknowledged by the Debtors and 24  
23 are sought by Parus Holdings. The second  
24 issue is the amount of the base monthly price  
25 that is used to calculate the monthly

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2 Reconciliation Payments. Here the choice is  
3 between the basic, and that is a quote,  
4 monthly service price of \$11.45, which is  
5 contended by the Debtors as being  
6 appropriate, or the unlimited monthly service  
7 price of \$27.40 as contended by Parus  
8 Holdings. We believe that both issues can be  
9 resolved by the Court through application of  
10 the contract terms to the undisputed facts.

Starting with the first issue, the number of Reconciliation Payments Intermedia was required to make, this question hinges on whether the contract and the parties' obligations under it were terminated on April 12, 2002, 30 days after EffectNet gave notice of written default to Intermedia. Section 5.2 of the contract entitled "Termination" provides that in the event of a contractual default, the contract can be terminated by giving a written notice of default to the defaulting party. It also specifies that the contract does terminate and will be effective 30 days after such notice, if the defaulting party fails to cure its defaults. As already



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2 Intermedia failed to cure its defaults within  
3 that 30-day period. Accordingly, applying  
4 the plain terms of section 5.2 of the  
5 contract to these admitted facts, the  
6 contract terminated on April 12, 2002. A  
7 ruling by this Court that the contract was  
8 terminated on that date would be consistent  
9 with the contemporary explanation by  
10 EffectNet's general counsel to WorldCom.  
11 Similarly, a ruling by this Court that the  
12 contract was terminated on April 12, 2002,  
13 would be consistent with EffectNet's  
14 contemporaneous acts. After Intermedia  
15 failed to respond to EffectNet's notice of  
16 default, EffectNet ceased performing on the  
17 contract. This is admitted by EffectNet.  
18 Such a cessation of performance is  
19 specifically authorized under section 5.3 of  
20 the contract, when the contract is terminated  
21 for any reason.

22                                  The consequences, Your Honor, of  
23 contract termination are significant. After  
24 termination, Intermedia has no ongoing  
25 obligation to continue paying EffectNet the

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Reconciliation Payments provided for under section 2.13 of the contract. As specified in paragraph 6 of the contract captioned "Survival," none of the party's obligations provided for in section 2 of the contract survive its termination, and this includes the obligation to pay Reconciliation Payments under section 2.12. The result is also consistent with section 5.3 of the contract, which provide for what obligations the parties do remain liable for upon termination of the contract. Those are obligations that accrued before the date of the termination.

Finally, Your Honor, on this point,  
it is made clear in section 11 of the  
contract which did survive termination, that  
neither party to the contract shall be liable  
to the other for any type of damages or at  
least for the type of damages that Parus  
Holdings seeks from Intermedia in this  
proceeding. In section 11, the parties  
provided that in no event shall either party  
be liable to the other for -- now, this is a  
direct quote -- "for any incidental,

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2 indirect, special, punitive, consequential,  
3 or similar damages of any kind, including  
4 without limitation, loss of profits, loss of  
5 business, or interruption of business.

Parus Holdings seeks to avoid these results and seeks to avoid summary judgment by arguing that limiting Parus Holdings' recovery to the four Reconciliation Payments that are due before or were due before April 12, 2002, somehow deprive it of the benefit of its bargain. We disagree. To the contrary, it seems quite obvious from the contract provisions that we just discussed, the parties in forming this contract bargained to put boundaries around their potential liabilities to each other. This is made, I believe, or evident by the penalty provision of the contract which is section 5.4, where had Intermedia -- not EffectNet -- terminated the contract early, Intermedia would have been liable for a maximum of one half of the 24 months of Reconciliation Payments Parus Holdings now seeks. Parus Holdings also seeks to avoid summary judgment

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2 through the affidavit and statements of the  
3 former general counsel of EffectNet, who is  
4 now general counsel of Claimant Parus  
5 Holdings, Robert McConnell. He, as I stated  
6 earlier, was the author of the March 12, 2002  
7 notice of default to Intermedia and the  
8 author of the March 25, 2002 letter to  
9 WorldCom explaining the consequences of  
10 Intermedia's default and failure to cure, and  
11 that being termination of the contract on  
12 April 12th.

Now, in this Court Mr. McConnell has filed an affidavit four years after the fact, in which he states that he did not intend in 2002 to terminate the contract. We submit, Your Honor, that quite obviously the best evidence of what Mr. McConnell intended to do by his actions in 2002 are the words he then used to describe the effect of the default notice that he sent. Quite clearly, he explained in 2002 that failure to cure by Intermedia on or about April 12, 2002 would work a termination of the contract. Under the best evidence rule and the other

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authorities cited in our related motion to strike, we believe Mr. McConnell's after the fact contradictory and self-serving statements should be disregarded by the Court in its evaluation of this summary judgment motion.

8                         Turning now to the amount owed by  
9 Intermedia for the Reconciliation Payments  
10 that it did not make is already noted.  
11 Section 2.13 of the contract, the amount of  
12 the Reconciliation Payments is a function of  
13 what it has described in the contract as the  
14 base monthly price of EffectNet's service  
15 times the numeric shortfall of end users  
16 resold by Intermedia as measured against the  
17 10,000 per month quota. There is no dispute  
18 as to the written numeric shortfalls for the  
19 months of December 2001 through March of  
20 2002. They are, as set forth in the table  
21 appearing at page 17 of Debtors' initial  
22 summary judgment. The only dispute is  
23 whether the base monthly price of EffectNet's  
24 service was the price of EffectNet's basic  
25 service or, as contended by Parus Holdings, a

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2        \$27.40 price of unlimited service. Both of  
3        these pricing options are described in  
4        appendix P of the contract at issue. We  
5        believe that based on the plain language in  
6        the contract, the \$11.40 per month price of  
7        basic service is the appropriate contractual  
8        reference point for ascertaining the base  
9        monthly price. Ignoring the plain language,  
10      we believe, of the contract, Parus Holdings  
11      contends that the unlimited service price is  
12      really the base monthly price.

In addition to being at grammatic  
odds with the contractual term base, Parus  
Holdings' contention, I believe, is  
inappropriately supported by the evidence it  
offers outside the contract itself, and that  
consists of its present CEO Mr. Reneau, who  
in his affidavit frequently states the  
conclusion that the unlimited price of \$27.40  
was what the parties intended to be used for  
the base monthly price. These, however, are  
ultimate conclusions, and they are not proper  
statements to support an evidentiary fact  
finding in summary judgment. Rule 56(e) of

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2 the Federal Rules, I think, makes this  
3 perfectly clear. In the words of the rule,  
4 ultimately and conclusory facts cannot be  
5 utilized on a summary judgment motion.  
6 Further, nowhere in Mr. Reneau's affidavit,  
7 which is lengthy, does he advise that he  
8 actually had firsthand experience or  
9 involvement with the negotiation of the  
10 contract at issue. He doesn't say he  
11 negotiated it. He doesn't say he even  
12 participated in the negotiation. Counsel's  
13 comments in briefs say he did, but he doesn't  
14 say that in his affidavit. Indeed, he didn't  
15 even sign the contract. Accordingly, we  
16 believe that Mr. Reneau's conclusory  
17 statements ought not be regarded concerning  
18 what is or what is not the appropriate base  
19 monthly price to be applied by this Court.

20 In summary on the contract breach  
21 issue, Your Honor, I believe that application  
22 of the contract terms to the acknowledged  
23 facts leads to three conclusions. First is  
24 that the contract was terminated on April 12,  
25 2002, 30 days after EffectNet gave written

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2 notice of default and Intermedia failed to  
3 cure its default. Two, Intermedia has  
4 liability to make Reconciliation Payments for  
5 the shortfall for the period commencing  
6 December 18, 2001, and concluding April 12,  
7 2002. The third conclusion, I believe, is  
8 that EffectNet's basic service price of  
9 \$11.45 should be utilized as the multiplier  
10 in determining what the amount of the  
11 Reconciliation Payments is that are owed to  
12 Intermedia. That is kind of a tortuous path,  
13 but sometimes to construe contracts, you have  
14 to go through that. I think the deficiencies  
15 that we assert in Parus Holdings'  
16 consequential damage claims can be dealt with  
17 a bit more succinctly, because those  
18 deficiencies relate to the principal elements  
19 of the claims.

20 Starting off with Parus Holdings' consequential damage claims against  
21 Intermedia, all of those are barred by  
22 section 11 of the contract between EffectNet  
23 and Intermedia. As I already read into the  
24 record, in section 11 the parties agreed to

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2 comprehensively limit their liability to each  
3 other. They specifically agreed that in no  
4 event would either be liable to the other  
5 for, among other things, consequential  
6 damages. As noted in our moving papers, such  
7 a limitation provision is enforceable under  
8 governing Arizona law, and the contract did  
9 provide that Arizona law would control with  
10 regard to the contract terms. As also  
11 provided in the authority cited to the Court,  
12 enforceability of such contractual  
13 limitations are particularly appropriate in  
14 commercial contracts, such as the one between  
15 these commercial entities and are before your  
16 Court.

17                   In response, Parus Holdings argues  
18                   that enforcement of section 11 would leave it  
19                   without an adequate remedy. It also argues  
20                   that the provision itself is ambiguous,  
21                   because there is a blank in it. We believe  
22                   and advocate to the Court that neither  
23                   argument is available. Even when section 11  
24                   is fully enforced, Parus Holdings retains the  
25                   breach of contract claim and remedy that the

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2 parties bargained for, which is the payment  
3 by Intermedia of the Reconciliation Payments  
4 that it owed to EffectNet when the contract  
5 terminated. As to the blank space creating  
6 an ambiguity, Parus Holdings cites no  
7 authority supporting that argument and, as  
8 noted in our reply in this matter under  
9 Arizona law, blank spaces in contracts don't  
10 by themselves create an ambiguity or make the  
11 provision unenforceable. Indeed, as pointed  
12 out in one of those Arizona cases, the blank  
13 space or the presence of a blank space simply  
14 shows the absence of any agreement on that  
15 particular subject. Here, section 11 is  
16 fully capable of being enforced as written.  
17 The blank, if filled in, would simply have  
18 provided for an exception to the scope of the  
19 liability limitation. No such exception was  
20 inserted. The way it reads is, except for  
21 damages arising under section blank, and then  
22 it proceeds, in no event shall either party  
23 be liable to the other for the various kinds  
24 of damages I just mentioned.

25 Concerning Parus Holdings' civil

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2 conspiracy claim, as noted in our moving  
3 papers -- and I don't think there is any  
4 disagreement here -- a claim for civil  
5 conspiracy cannot rest on proof of the  
6 conspiracy alone. It must be accompanied by  
7 evidence of acts in furtherance of the  
8 conspiracy for a claim to lie. This is true  
9 in all the state laws that are potentially  
10 applicable to this matter. I don't think  
11 Parus Holdings disputes this. But  
12 significantly here, all of the acts that  
13 Parus Holdings asserted were acts in  
14 furtherance of the asserted conspiracy  
15 occurring after the merger of WorldCom with  
16 Intermedia effective July 2, 2002. This is  
17 significant, we believe, because it is the  
18 general rule that parent and wholly-owned  
19 subsidiary corporations cannot be found to  
20 have conspired with each other, because their  
21 economic interests are such that they are  
22 regarded as one entity.

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2 are initially cited, I believe, at page 10 of  
3 our opening brief. In response, Parus  
4 Holdings offers a handful of cases that had  
5 not applied the Copperweld rationale outside  
6 its original antitrust context. Those cases  
7 are discussed in our reply brief, starting at  
8 page 22. But for today's purposes, I think  
9 it is sufficient simply to say, there are no  
10 controlling cases that are contrary to  
11 Copperweld. There are no better reasons and  
12 more persuasively analyzed cases than the  
13 Supreme Court's considering the inability of  
14 a parent and a subsidiary corporation to  
15 conspire with each other in an actionable  
16 fashion. Accordingly, we believe the  
17 conspiracy counterclaim should be summarily  
18 rejected.

19 Parus Holdings' tortious  
20 interference claim is, we believe, similarly  
21 deficient. It is the general rule that a  
22 parent corporation may not be held liable in  
23 tort for interfering with a subsidiary's  
24 contractual relations with a third party  
25 under the same analysis as used by the

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2       Copperweld Court in saying that a conspiracy  
3       claim won't lie against them. Their economic  
4       interests are so aligned, they are regarded  
5       as one entity and, therefore, when a parent  
6       company tells a subsidiary to breach a  
7       contract, if that were the case, that is not  
8       deemed interference, tortious interference,  
9       by the general rule.

10                         There are numerous cases on this  
11 subject, many of which have been cited to the  
12 Court by both parties. One, I think, is  
13 perhaps more instructive than most, and that  
14 is the Second Circuit's decision in the  
15 Boulevard case. In that case, applying  
16 Connecticut law, the Court of Appeals  
17 reversed a District Court ruling finding that  
18 a corporate parent had tortiously interfered  
19 with a subsidiary's contractual lease by  
20 directing the subsidiary to stop paying rent.  
21 In reversing, the Court noted that because of  
22 the significant economic unity of interest  
23 between a parent and a subsidiary -- and this  
24 is a direct quote from the case -- "we do not  
25 believe that such a shareholder can be

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2 considered a third party capable of  
3 interfering with its own company's  
4 contracts."

25 MR. DRISCOLL: That was my

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2 estimate, Your Honor.

3 JUDGE GONZALEZ: All right. I  
4 believe we started about five minutes late.

5 MR. DRISCOLL: Then I should wrap  
6 up, shouldn't I?

7 JUDGE GONZALEZ: Yes.

13 Thank you, Your Honor.

14 JUDGE GONZALEZ: All right. Thank  
15 you.

16                           MR . FRIEDMAN : Good afternoon . May  
17 it please the Court , Robert Friedman from  
18 Kelley Drye & Warren for Parus .

19 Your Honor, I think it is important  
20 before we address the substance of the  
21 summary judgment motion to place the Debtors'  
22 motion in context. There has not been  
23 discovery in this case. They are asking for  
24 the extraordinary and unusual relief of  
25 summary judgment before discovery, a motion

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2 which is in this Circuit, quote, unquote,  
3 from the Diversified Carting case that we  
4 cite, rarely granted. Not only do they seek  
5 summary judgment prior to the completion of  
6 discovery, not only have they failed to  
7 produce entire categories of relevant hard  
8 copy documents, not only have they not  
9 produced any documents from the electronic  
10 searches, but they failed to introduce any  
11 evidence in a case in which it is  
12 self-evident that there are inherently  
13 factual questions on both the contract and  
14 tort claims. I think it is important also  
15 placing this in context.

If you look at the source of this motion, our proof of claim was filed three years ago. Our claims have not changed since then. The timing has not changed. The substance of the claims have not changed. They did not make a Motion for Summary Judgment at that time. A year and a half ago in the summer of 2004, the claim objections were fully briefed and submitted. At that time, Your Honor, they did not make a summary

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judgment motion. They didn't tell the Court that they were purely legal claims here and that our legitimate claims could be dismissed outright. What happened was after the briefing on the claim objections a year and a half ago, we then pursued discovery in this case and, as the Court is aware, there has been a long and tortured history with respect to getting any documents from the Debtors. We had to make a motion to compel over the summer, and that is the first time, Your Honor, in which the summary judgment motion was raised. Their whole defense to our motion to compel, Your Honor, was: "Oh, now we are making a summary judgment motion, and there is an easy way out. We don't have to get into the Zubulake issues. We don't have to get into cost shifting. We don't have to get into a complex analysis of what was produced and not produced. Just dismiss the case or grant us the summary judgment motion on the nominal amount which they agree they owe us on an admitted breach of contract." Your Honor, the easy way out is not the

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2 proper way out and it is not the legal way  
3 out in this case.

The Court is certainly aware of the standard for summary judgment. We are entitled to every single inference. When a summary judgment motion is made prior to completion of discovery, that deference is magnified exponentially. I mentioned the Diversified Carting case. We also cite the Sanders case in which the Court said, if there is even an expectation of material evidence, that is enough to defeat a summary judgment motion under Rule 56(f). We have made a detailed specific showing, both from an affidavit that I submitted and that Mr. Reneau submitted, that there is a great deal of material and relevant evidence that has not been produced with respect to both our contract and tort claims. These include documents relating to the termination of our product, the UC Contract communications between WorldCom and Intermedia during the relevant time period, which is prior to the date of the merger, and documents relating to



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2 first time, they have informed us, Your  
3 Honor, that they are doing a search for the  
4 electronically stored documents. That is  
5 underway right now. In addition, we have now  
6 received information with respect to a  
7 privilege log in which they have withheld  
8 documents that involve communications between  
9 WorldCom and Intermedia prior to the merger.  
10 There is absolutely no basis for them to  
11 withhold these documents. We are waiting for  
12 these electronic documents to be produced.  
13 We are waiting for the documents from the  
14 privilege log and we are waiting for the hard  
15 copy documents. We don't have those yet.

16                                 Rule 56(f), Judge, is a strong  
17 basis for this Court not even to entertain  
18 this motion at this time. We are still  
19 litigating the discovery. However, I want to  
20 address the substantive claims in any event,  
21 and I will start with the contract claim.  
22 There are two sources of direct damages, two  
23 types of direct damages that we are claiming  
24 through the contract. One is the minimums,  
25 called the Reconciliation Payments, which

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2 Mr. Driscoll referred to, and the other are  
3 the benefit of the bargain damages. Make no  
4 mistake about it. I believe, not  
5 intentionally so, but there was some overlap  
6 in Mr. Driscoll's presentation with respect  
7 to the limitation of liability clause. We  
8 address in our papers why that provision  
9 should not be enforced, but I am not going to  
10 address that here because I recognize there  
11 is a concern on timing and we address it  
12 sufficiently in our papers. The damages I am  
13 going to talk about now are direct damages,  
14 not consequential, the direct damages that we  
15 are entitled to under the contract.

When Mr. Driscoll says that we have a remedy under the contract, what he doesn't say is the key provisions under the contract sections 2.12 and 2.13, they don't say that the reconciliation obligation stops at termination. What they say and in reliance of this we ramped up, which is specified in the Taj Reneau affidavit, and we relied on this provision in the contract, until December of 2003, which is the 24 months that

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2 Mr. Driscoll referred to, they had a minimum  
3 payment due to us. That is a clear  
4 contractual obligation. What they are saying  
5 now is because they didn't pay us and because  
6 they stopped performance and because they  
7 breached the contract, their obligation to  
8 make that payment stops upon termination, and  
9 that is just not the case. I am going to  
10 even assume for this argument, Your Honor,  
11 that they are right about Mr. McConnell's  
12 submission with respect to the termination of  
13 the contract, which we strongly dispute, and  
14 I will address it in a moment. But even  
15 assuming they are right, our claims had  
16 accrued by their own admission in July of  
17 2001. The timing is critical. There was no  
18 termination until April of 2002. At that  
19 time, under the definition of "accrual,"  
20 which we set forth in our papers and the  
21 principle anticipatory repudiation, they  
22 become liable for all the minimums under the  
23 contract. That is the way anticipatory  
24 repudiation works. They are obligated to  
25 give us minimums up through December of 2003.

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2 They tell us we are not performing, which  
3 they did as of July of 2001. They  
4 essentially shut down the contract. At that  
5 point their contractual obligations can be  
6 enforced at any time. Those claims have  
7 accrued. We have cited several cases from  
8 the Arizona Supreme Court, Gust, Rosenfeld,  
9 which says claims accrue at the time you can  
10 sue. When they told us that they weren't  
11 going to perform, we could sue at that time.  
12 The claims accrued. We also cite the Enyart  
13 case, the Arizona Appeals Court decision, in  
14 which despite the fact that there was no  
15 obligation to pay at that point, as we had in  
16 this case, the claims had accrued and their  
17 obligations under the minimum, provisions  
18 2.12 and 2.13, had accrued. They don't  
19 address our accrual argument in their papers  
20 and Mr. Driscoll didn't address it here.  
21 They don't address our anticipatory  
22 repudiation argument either. Under  
23 anticipatory repudiation, as the Court is  
24 aware, once a party indicates that it is not  
25 going to perform, we are entitled to cease

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2 performance and enforce our claims under the  
3 contract, even claims for which a payment  
4 obligation had not been made yet, or under  
5 the contract terms, a time had not come up.  
6 What they say -- and by the way, we cite the  
7 United California Bank case, another case  
8 directly on point that says, if one party  
9 indicates it will not perform, the breach is  
10 committed at that time and the remedy  
11 accrues, not for just their outstanding  
12 invoices, but for what they obligated  
13 themselves to under the contract, which is  
14 the minimum payments. That is why we devoted  
15 one-third of our entire company to this  
16 product, which we set forth in the Reneau  
17 affidavit. Their only response to this, Your  
18 Honor, without citing any authority in their  
19 reply, when we raise the anticipatory  
20 repudiation and the accrual argument is,  
21 well, you didn't elect your remedy properly.  
22 They say, when we told you we weren't going  
23 to perform, what you should have done is you  
24 should have elected your remedy and sued us.  
25 Well, the reason they cite no authority on

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2 that, Your Honor, is it is directly contrary  
3 to Arizona law. There is an Arizona case  
4 directly on point, in which this argument was  
5 made by the breaching party, and the Supreme  
6 Court of Arizona rejected it. That is the  
7 case of Kammert Brothers v. Tanque Verde.  
8 Now, that case is not in our papers, and I  
9 want to put the citation on the record,  
10 because this election argument was first  
11 raised by Debtors in their reply papers, and  
12 we, obviously, don't get a sur reply. The  
13 cite of this case is 102 Ariz. 301, parallel  
14 citation 428 P.2d 678. If the Court could  
15 indulge me to read the relevant quotation in  
16 this case. It alone is a basis to reject  
17 their entire argument with respect to the  
18 minimums. The Supreme Court said, quote, the  
19 seller claims that there can be no  
20 anticipatory repudiation here, since the  
21 buyer failed to immediately treat the  
22 repudiation as a breach and bring suit. We  
23 believe that it is not necessary to say that  
24 a breach is not an anticipatory breach until  
25 it has been accepted as such by the injured

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2 party. A party that has received a definite  
3 repudiation by the other party to the  
4 contract should not be penalized for his  
5 efforts to make the other party live up to  
6 his end of the bargain and can cease urging  
7 performance and bringing suit for the breach  
8 at any time before the other party retracts  
9 his repudiation. That is the law of

10 California. Under that law, Your Honor, the  
11 minimums for the 24 months became accrued --

12                            JUDGE GONZALEZ: That is a law of  
13 California or Arizona?

14 MR. FRIEDMAN: I am sorry, Your

15 Honor. I was thinking of the United  
16 California Bank case. It is in Arizona. I

17 apologize. Now, this is directly on point,  
18 because that is exactly what happened here.

19 Mr. McConnell in his letters was seeking to  
20 do exactly that exactly what the Arizona

21 Supreme Court said you can do, which is try  
22 to resolve the issue. They refused to pay  
23 us. We sent a letter that says "pay us," and  
24 we cited the provisions of the contract,  
25 which Mr. Driscoll pointed out. But the

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2 McConnell letter also contains conditional  
3 language, even beyond the anticipatory  
4 repudiation point. Mr. McConnell explains in  
5 his affidavit that his goal in sending this  
6 letter was to get payment of the amounts due,  
7 as the Court in Kammert said was permitted  
8 under Arizona law. He says at various points  
9 in both letters, which is not cited by the  
10 Debtors, if there is a termination, we may  
11 seek termination. Clearly, Your Honor, those  
12 letters, which Mr. McConnell explains, are  
13 not a basis to extricate Debtors from their  
14 clear obligations under the contract.

15                           In addition, Your Honor,  
16 Mr. McConnell in his affidavit offers  
17 uncontradicted evidence that the parties  
18 after he sent the letter did not treat the  
19 contract as terminated. He specifically  
20 cites some discussions with Jeffrey Shu, a  
21 WorldCom attorney. This is unrebutted. In  
22 fact, the only response to this submission,  
23 Your Honor, is a motion to strike this  
24 evidence.

25 I just want to address very

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2 briefly, Your Honor, the pricing issue which  
3 Mr. Driscoll discussed. Make no mistake  
4 about it. The term "base monthly price" is  
5 an undefined term. It is not defined  
6 anywhere in the contract. This is  
7 tailor-made for the introduction of evidence  
8 to explain what the term means. "Base  
9 monthly price" is not defined. Under the  
10 decisions that we point out in response to  
11 their motion to strike the Reneau affidavit,  
12 Arizona law is very liberal with respect to  
13 the introduction of evidence and the  
14 consideration of evidence. If it doesn't  
15 contradict the contract, it comes in and  
16 should be considered. Here, Mr. Reneau  
17 explains that the only price that was  
18 negotiated was the unlimited price. "Base  
19 monthly price" is a term of art. Basic  
20 service and "base monthly price" are not  
21 equivalent. Those are explained in the  
22 affidavit. Should the parties have defined  
23 the term "base monthly price"? Yes, they  
24 should have. All of the accounts, I think  
25 with the exception of one, were unlimited

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2 service.

As Mr. Reneau explains in his affidavit, the basic service was simply a fallback to do some sampling. If someone wanted to sample the service, they could use the basic service just to see what it is like. Like if a salesmen goes out and says, "Hey, do you want to try it for a week and use the basic service?" Importantly also, as explained in the Reneau affidavit, the basic service came with additional costs. The unlimited service, which was the base, as Mr. Reneau explains, and which is a term of art in the industry, was a fixed rate. It was a fixed basic rate.

17                   Your Honor, finally on the  
18 contract, the Debtors misunderstand  
19 apparently what our "benefit of bargain"  
20 argument is. We are not seeking  
21 consequential damages. Under Arizona law,  
22 benefit of the bargain damages are direct  
23 damages. We are seeking loss of value, which  
24 the restatement, which Arizona follows,  
25 directly distinguishes between consequential

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2 damages and benefit of the bargain damages.

3 This is an entirely separate category of our  
4 claim. We are seeking the benefit of our  
5 bargain, the loss of value of this contract  
6 to us, and all the back-up evidence is  
7 submitted, again, in the Reneau affidavit.

8 With respect to what we did, it is undisputed  
9 by the Debtors.

With respect to the tort claims,  
Your Honor, we have several different tort  
claims. I recognize that we are running out  
of time, so I will try to be brief. The most

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2 important issue with respect to their tort  
3 claims in which the Court does not even have  
4 to get into all of the issues with respect to  
5 Copperweld, and the exceptions to the  
6 privilege involve very simply this: prior to  
7 January 1, 2001, these were not unified  
8 entities. It is undisputed the bulk of our  
9 tort claim, not all, but the bulk of our tort  
10 claims, and our allegations relate to the  
11 period from September 2000 to July 2001.  
12 They simply have no basis to assert privilege  
13 in this case, Your Honor, and they have no  
14 response to this in their papers. Look  
15 through their papers. You will see that  
16 their only response is to say, "Well, yes,  
17 you do allege that the allegations occurred  
18 during that time period. But you know what?  
19 That is just boilerplate, so we should just  
20 ignore that." Even though, obviously, that  
21 is essentially a 12(b)(6) motion that is  
22 being decided on the pleadings, because we  
23 haven't had the benefit of discovery. We  
24 have alleged and we have shown very clearly  
25 and specifically, as best we can with the

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2 limited discovery, that between September  
3 2000 and July 2001 there was significant  
4 evidence that WorldCom never intended to go  
5 forward with this contract. Because of their  
6 competitive product, they took the legs right  
7 out of our own product. What they do, Judge,  
8 is they say, "Well, you know what? We have  
9 this Antitrust Order, and it is curious that  
10 you didn't hear Mr. Driscoll mention the  
11 Antitrust Order, because this was this whole  
12 defense to our opposition." This was their  
13 whole response to our opposition, when we  
14 argued that it is a factual issue with  
15 respect to an exception, the exception of  
16 wrongful means. We showed that WorldCom used  
17 wrongful means with respect to their conduct  
18 on this contract. What they said was, "Hey,  
19 listen, we have this Antitrust Order that  
20 obligates us to divest of Intermedia."  
21 Mr. Driscoll didn't mention this for several  
22 reasons during his argument. Number one, the  
23 Antitrust Order is extremely important,  
24 because the language of the Antitrust Order  
25 says that they are not to do anything to

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2 abrogate or hinder the contractual  
3 relationships between Intermedia and its  
4 contracting parties. They must divest of  
5 these entities as a going concern. They  
6 violated that. Not only did they violate our  
7 rights, Your Honor, but they violated the  
8 Antitrust Order. In addition, if you accept  
9 that the Antitrust Order has any place as a  
10 defense to our showing that they used  
11 wrongful means, under the Antitrust Order  
12 there is no unity of interest. They don't  
13 have a privilege to begin with, because if  
14 you look at the terms of the Antitrust Order,  
15 it specifically says that WorldCom and  
16 Intermedia are to be deemed separate  
17 entities, competitive. This was a condition  
18 put upon them by the Department of Justice.  
19 They had no basis to assert a privilege under  
20 the Antitrust Order.

21 Your Honor, I think it is  
22 self-evident and I don't need to spend a lot  
23 of time on the exception to the privilege  
24 that they assert with respect to our tortious  
25 interference and the conspiracy claim. We

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2 can show that it was not in the subsidiary's  
3 interest. We can show wrongful means. The  
4 cases hold conclusively that these are  
5 fact-based considerations. We have received  
6 no discovery. We have made a showing on the  
7 limited discovery we have that is set forth  
8 in our papers with respect to both the direct  
9 and circumstantial evidence of both the  
10 improper conduct, the wrongful means, and the  
11 fact that this was not in Intermedia's  
12 interest.

13                   Your Honor, at best this motion is  
14 premature, and at worse it is frivolous.  
15 Either way, it should be denied.

16 JUDGE GONZALEZ: All right. Thank  
17 you.

18 Mr. Driscoll, do you care to  
19 respond?

20 MR. DRISCOLL: Very briefly. I  
21 agree with counsel that the Court can look at  
22 the pending motion as a motion brought under  
23 12(b)(6) of the Federal Rules, the motion to  
24 dismiss, and that it does not require  
25 evidence outside for the matters that are

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2 before the Court at this point. Certainly  
3 the contract speaks for itself and so on. I  
4 do not think any further evidence is  
5 required, so I agree.

6 Thank you, Your Honor.

7 JUDGE GONZALEZ: All right. Thank  
8 you. I will take it under advisement.

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C E R T I F I C A T E

3 STATE OF NEW YORK )  
4 COUNTY OF NEW YORK ) : SS :

5

6 I, DEBORAH HUNTSMAN, a Shorthand  
7 Reporter and Notary Public within and for the  
8 State of New York, do hereby certify:

9                   That the within is a true and  
10    accurate transcript of the proceedings taken  
11    on the 17th day of January, 2006.

12 I further certify that I am not  
13 related by blood or marriage to any of the  
14 parties and that I am not interested in the  
15 outcome of this matter.

16 IN WITNESS WHEREOF, I have hereunto  
17 set my hand this 20th day of January, 2006.

18

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19 DEBORAH HUNTSMAN

20

21       \*\*DIGITALLY RECORDED CD RECEIVED BY COURT  
          REPORTER ON 1/18/06 AT 12:45 P.M.

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